BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROUSSEL S. BOUDREAUX Claimant	)	
VS.	)	Docket No. 1,020,703
LEARJET, INC. Self-Insured Respondent	)	

ORDER

Respondent appealed the February 22, 2005 preliminary hearing Order entered by Administrative Law Judge (ALJ) John D. Clark.

ISSUES

The ALJ found claimant "was injured out of and in the course of his employment with the respondent on November 15, 2004"[1], and authorized John P. Gorecki, M.D. to be the claimant's treating physician. Past medical expenses were also ordered to be paid.

Respondent appears to admit that claimant suffered an accident at work on the date alleged, but denies that claimant suffered any injuries as a result of that accident.

> Respondent concedes that the claimant was involved in an incident on November 15, 2004 when he slipped in an aircraft. However, after reviewing the totality of the facts, including the mechanism of injury and the claimant's activities immediately after the incident and continuing, respondent asserts that it is more likely than not that the claimant did not sustain a personal injury. Therefore, respondent asks that the Board overturn ALJ Clark's finding that the claimant

[1] ALJ Order (Feb. 22, 2005).

> suffered an injury arising out of and in the course of his employment and deny any further medical treatment or other workers compensation benefits."[2]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board finds and concludes that the ALJ's Order should be affirmed.

Claimant alleges he injured his neck, left shoulder, arm, hand and left leg on November 15, 2004, when he slipped and fell while walking through an airplane.[3] At the preliminary hearing, claimant described his accident as follows:

> I was standing at my post where I stand as an inspector. There's a call board there. A lead man came and asked me to come look at something, he wanted me to write an NCR. So we went to the aircraft in question. I was walking through the aircraft on the inside, stepped on one of the floorboards with my left foot. The floorboard moved and I fell through the hole. I hurt my leg, scratched up my leg, my hand and jerked my neck.[4]
>
> After that, I got up and I looked at my leg, it was scraped up, looked at my hand, it was scraped up, and just kind of brushed myself off and everybody asked if I was all right. I said I think so and continued, you know, looking at what the guy wanted me to look at in there.[5]

Claimant testified that his lead man, Ken Kyburz, was present and witnessed his fall. In addition, claimant testified he also reported the accident to his supervisor, Jim Phillips, within 10 to 20 minutes and went to the first aid office that same day. Claimant was also seen by the respondent's authorized treating physician, Dr. Wilkinson, about one week after the accident.

Despite the testimony that claimant's accident was witnessed by his lead man and almost immediately reported to his supervisor, respondent in its brief to the Board refers to it as an "incident", and an "alleged" accident. In addition, despite the lead man and the supervisor being identified by name, respondent did not call those individuals as witnesses to refute claimant's testimony. Instead, respondent points to claimant's description of the accident as being "incongruous".

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[2] Brief of Appellants at 4 (filed Mar. 22, 2005).

[3] K-WC E-1 Application for Hearing (filed Dec. 28, 2004).

[4] P.H. Trans. at 6.

[5] *Id.* at 14.

> The claimant's alleged personal injury occurred when his left foot slipped past the temporary plywood floor in the airplane causing his left leg to fall approximately 24 inches to the bottom of the aircraft and then catching himself with his left hand as all this was occurring.(citation omitted) He states that he caught himself with his left hand 'where the plywood would have been....' (citation omitted). The statements are incongruous. How could he catch himself where the plywood would have been? The plywood was the temporary floor. If the plywood was not there then [his] left hand would have landed in the same place as his left foot, [on] the bottom of the airplane. This 'catching' with his left hand does not seem to indicate the 'jerking' sensation the claimant described as allegedly causing his neck injury. Furthermore, the claimant continued working after the incident and did not seek medical treatment for at least one week after the incident. The claimant's story of how he hurt himself and his actions following the incident point more toward the conclusion that the claimant did not suffer a personal injury as a result of the incident occurring on November 15, 2004.[6]

As stated, it is not clear whether respondent is admitting or denying that an accident occurred on November 15, 2004. The question that the ALJ posed to respondent's counsel at the preliminary hearing was "[d]oes respondent admit or deny a work-related injury on that day?"[7] Respondent's answer was "[d]eny", but because the question combined accident and injury it is not clear whether the respondent was denying both or only denying that an injury resulted from a work-related accident. In either case, claimant's testimony that he suffered an accident is uncontradicted and the Board finds that claimant did have an accident on November 15, 2004, as alleged.

Turning now to the question of whether claimant suffered personal injury as a direct result of the November 15, 2004 accident, respondent points out that the body parts allegedly injured are "the same body parts injured in a previous accident in March 2003 and settled via an Agreed Award dated December 23, 2003".[8] In addition, respondent contends that claimant's actions following the incident, in particular his weightlifting activities, are inconsistent with his allegations of injury and point to the weightlifting as being a more probable cause of the alleged injuries. "If the Board determines that the claimant suffered a neck injury, respondent asserts that the injury is related to an aggravation of the claimant's pre-existing neck injury due to the claimant's vigorous weightlifting activities at Genesis Health Club."[9]

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[6] Brief of Appellants at 4-5 (filed Mar. 22, 2005).

[7] P.H. Trans. at 3.

[8] Brief of Appellants at 2-3 (filed Mar. 22, 2005).

[9] *Id.* at 6.

Claimant admitted that he has continued to workout with weights at the Genesis gym and initially said he has not curtailed his workouts.

> Q. Now then, since this time, since this accident, you belong to Genesis gym; don't you?
>
> A. Yes.
>
> Q. Have you continued to work out there?
>
> A. Somewhat, yes.
>
> Q. Okay, when you say somewhat, have you curtailed the workout that you do, that you did prior to this injury?
>
> A. No.[10]

However, on cross-examination, claimant explained that he did not understand the word "curtailed" to mean reduced or limited and that he had, in fact, since the accident reduced the amount of weight that he lifts and the frequency of his workouts.

> Q. Have you curtailed -- do you know what curtailed means?
>
> A. No.
>
> Q. Mr. Zongker used that word, I didn't. Had you reduced or limited the amount of weight lifting [sic] that you have done since your injury on November 15 of 2004?
>
> A. Yes.
>
> Q. And how was -- well, your answer was to him you hadn't curtailed it.
>
> A. I have reduced the amount of weight that I have lifted since then.
>
> Q. Okay, you are talking about the actual weight. Have you curtailed or reduced the number of times that you have worked out at Genesis since November 15?
>
> A. Yes.[11]

In addition to his prior work-related injury, claimant acknowledged having other accidents or incidents away from work, including two occasions where he was hit in the head by individuals. One of those individuals, Edward Bell, Jr., testified in this matter by

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[10] P.H. Trans. at 8.

[11] *Id.* at 19.

deposition. Mr. Bell was a former friend and workout partner of claimant. Claimant described the circumstances surrounding the termination of their friendship into what he described as now being "enemies". It is not necessary to repeat those circumstances in this order, but suffice it to say there is a great deal of hostility between claimant and Mr. Bell. Mr. Bell gave testimony to the effect that claimant had made statements to him that indicated that claimant had faked his previous work injury. Mr. Bell offered no information relative to the accident which is the subject of this claim. His testimony appears relevant only to the question of claimant's credibility and veracity. However, given the relationship between claimant and Mr. Bell, and the circumstances surrounding their falling out, it is difficult to give Mr. Bell's testimony much weight.

The record contains evidence that claimant frequented the gym more often than what he indicated was his reduced workout schedule, but claimant explained this inconsistency as being due to the fact that he would go to the gym for other reasons than just weightlifting, including tanning and using the treadmill. There is also a question about whether claimant was forthright with his treating physician about his workouts. However, the absence of an entry in the medical records about claimant's weightlifting activities may mean that claimant was not asked, or that the physician did not consider it important to record. It is noteworthy that there is no entry in the medical records to the effect that claimant misrepresented his workouts to a physician.[12]

Finally, there is the videotape[13] which shows claimant lifting weights at his health club. Respondent contends that the videotape shows claimant performing certain types of lifts that claimant denied doing and also shows him working with heavier weights than what claimant described in his testimony. “This video surveillance directly contradicts the claimant’s testimony and displays the claimant performing vigorous weightlifting activities which include a great deal of weight, more than the weight testified to by claimant during the preliminary hearing.”[14] As for the type of lifting, it appears from claimant's testimony that there may have been some confusion caused by a difference in terminology. As for the precise amount of weight that claimant was lifting this cannot be discerned from the videotape. Perhaps the claimant could answer questions about what the videotape shows, or perhaps another weightlifter could estimate the weights, but the videotape standing alone without testimony does not persuasively contradict claimant's testimony. Nevertheless, the videotape does show that claimant does not appear to be in any obvious physical distress while lifting weights. We have only his testimony that he has reduced the

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[12] Claimant’s Exhibit 1 to the preliminary hearing, contains handwritten progress notes dated November 23, 2004, December 3, 2004 and December 17, 2004, which appear to be from respondent’s first aid office. There is some mention of restrictions and lifting weights, but the writing contains abbreviations and symbols that are not discernable and there was no testimony offered explaining the entries.

[13] P.H. Trans., Resp. Ex. 3.

[14] Brief of Appellants at 5 (filed Mar. 22, 2005).

amount of weight he lifts as a result of his accidental injury. It would be helpful to know what claimant's physicians have advised him concerning his weight training, but that question was not asked at the preliminary hearing.

The record contains recommended work restrictions imposed by Pedro A. Murati, M.D., stating that claimant should be restricted to an 8 hour work day. Dr. Murati imposed permanent restrictions limiting work above the shoulder level and limiting lifting, carrying, pushing and pulling to 20 pounds occasionally and 10 pounds frequently. Claimant was also to avoid climbing ladders, crawling and working more than 24 inches from the body and was to avoid awkward positions of the neck.[15] Those restrictions were part of an independent medical evaluation performed by Dr. Murati who was not claimant's treating physician. There was no specific mention of any weightlifting restriction in regard to exercise, but it would seem logical that the restrictions would apply equally to work and non-work activities. It is not known whether those restrictions were followed by respondent in returning claimant to work following his prior neck injury. However, claimant described his job duties as light.

While there is some evidence that suggests claimant's November 15, 2004 accident did not cause a significant injury, there is no medical evidence or testimony that says claimant was not injured. The ALJ obviously believed claimant's testimony that the accident caused him additional injury. Based on the record compiled to date, the Board finds and concludes that the accident resulted in at least a temporary aggravation of his pre-existing condition. Accordingly, the ALJ's order for additional medical treatment is affirmed.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated February 22, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant
Vince A. Burnett, Attorney for Self-Insured Respondent
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[15] P.H. Trans., Resp. Ex. 1 at 8.